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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ROTHEREE RENE FOSTER, Defendant and Appellant.	C086677 (Super. Ct. No. 7FE002117)

Defendant Rotheree Rene Foster was charged by a complaint deemed an information with assault by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4)—count one)[1] and battery causing serious bodily injury (§ 243, subd. (d)—count two); Jeff S. was the alleged victim in both counts. As to count one, it was

[1] Undesignated statutory references are to the Penal Code.

alleged that defendant personally inflicted great bodily injury (§ 12022.7, subd. (a)). As to both counts, it was alleged that defendant had suffered four strikes (§§ 667, subd. (e)(2), 1170.12, subd. (c)(2)).

A jury convicted defendant on count one but found the allegation of personal infliction of great bodily injury not true. As to count two, the jury acquitted defendant of the charged offense, but convicted him of misdemeanor battery (§ 242), a lesser included offense.

The trial court thereafter found three of the alleged prior convictions true. After denying defendant's requests to strike his prior strikes, to reduce count one to a misdemeanor, and to grant probation, the court sentenced defendant to four years in state prison (the low term on count one, doubled for the strikes). The court imposed a 60-day concurrent term on count two, with credit for time served.

Defendant contends he could not properly be convicted of both assault by means of force likely to produce great bodily injury and battery. We shall affirm defendant's convictions and sentence, but order the abstract of judgment corrected.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of December 14, 2016, Jeff S. and his son, Jacob S., were operating a concession stand set up outside a call center in Sacramento, where they had done business for a couple of years. The call center was open later than usual because it was handling open enrollment for Covered California. Defendant's niece worked there; defendant gave her rides to and from work.

Around 7:30 p.m., as his workday ended, Jeff S. prepared to load his pickup truck with the supplies for his business. He went out to get the pickup truck, which was parked in its normal spot, to back it up to the concession stand. But he came upon a car sitting so close to the area where he needed to back up that he did not think he would be able to get his pickup truck past it. He asked the car's passenger if the driver could move the car, but the driver did not.

Jeff S. tried to squeeze the truck past the car, but as he did so his bumper touched the other car's bumper. The driver, a very large man later identified as defendant, got out, came over to Jeff S., and tried to pull him out of the truck by his neck and shoulders while demanding money for the damage to his car. Jeff S. told defendant that if he would let him park the truck, he would get some money for him.

After parking the truck, Jeff S. began walking toward the building as defendant and his passenger followed him. Jeff S. again told defendant he would get some money for him and turned around. Defendant grabbed him and punched him in the face, knocking him unconscious.

An eyewitness, Michelle L., yelled at defendant to stop. Defendant refused, claiming Jeff S. had been "trying to run people over." Defendant and his companion repeatedly picked Jeff S. up off the ground and dropped him, and appeared to be dragging him in between two cars. He still looked unconscious, "like a ragdoll" or "a limp noodle." Michelle L. called 911. While on the call, she saw defendant throw another punch at Jeff S., who was on the ground.

Jacob S., told that his father was on the ground, ran out and found him sitting in the parking lot, conscious but unresponsive and in a daze. He saw a woman video recording the attack on Jeff S. with her cell phone. A man who had been leaning against a parked car ran toward the woman and knocked the phone out of her hand. The man and his companion got into the car and sped off, with the larger of the two men driving.

Sacramento Police Officer Anthony Hoang, dispatched to the scene, obtained the license plate number of the suspect vehicle, which turned out to be registered to defendant.[2]

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[2] For reasons not explained in the record, there was no medical testimony. Instead, counsel stipulated to the introduction of Jeff S.'s medical records in evidence as an

DISCUSSION

1.0 Battery Conviction

Defendant contends his conviction for battery (count two) must be set aside because a person may not properly be convicted of both assault and battery arising from the same act. According to defendant, a person may not be convicted of both a greater offense and a necessarily included offense, and assault is a necessary element of battery; it is impossible to commit battery without assaulting the victim. Defendant concludes the remedy of a conviction on both is reversal of the misdemeanor battery offense. We disagree.

1.1 *Background*

During the instructions conference, the trial court noted that its proposed packet included CALCRIM No. 3515, which states: "Each of the counts charged in this case is a separate crime. You must consider each count separately and return a separate verdict for each one." The court then observed, with defense counsel's agreement, that battery appeared to be a lesser included offense to count two, as did simple assault to count one.

Defense counsel stated: "As to [CALCRIM No.] 3515[,] . . . it's indicating there's separate crimes. There is a different instruction that talks about alternative versions of the same event." The "different instruction" is CALCRIM No. 3516, which states that the crimes charged in different counts "are alternative charges. If you find the defendant guilty of one of these charges, you must find (him/her) not guilty of the other. You cannot find the defendant guilty of both."

The trial court replied: "I don't know [that] they're alternatives [as] opposed to [section] 654[']s. It's clear to me they're [section] 654[']s . . . , but it's not clear to me that they're alternatives."

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exhibit to be sent into the jury room, then argued to the jury (which had not yet seen the records) whether they proved great bodily injury.

The prosecutor asserted that the offenses charged were not alternative versions of the same crime because they had different elements.

Observing that the "[q]uestion becomes, is it a dual-conviction situation," the trial court tentatively agreed with the prosecutor's position, but added that the issue could be "easily resolved. We can do whatever research we want between now and then. I can modify the instruction at the last moment to add in [']dual convictions are prohibited[,'] . . . then basically the Court dismisses one. But I'll double-check it."

Subsequently, the dual-conviction question had not yet been resolved. However, it appears from a remark by the prosecutor that the court had tentatively included CALCRIM No. 3516 in the instructions packet. The prosecutor added: "[I]f I get anything prior to the Court instructing, I'll just ask to have a minute so we can discuss it outside the presence of the jury." Closing arguments immediately followed these remarks. The prosecutor argued for conviction on both counts as charged; defense counsel argued for acquittal on the ground that the prosecution witnesses were not credible. Neither counsel asked for conviction on the lesser offense as to either count.

The trial court then instructed the jury. It did not give CALCRIM No. 3516.

1.2 *Analysis*

A defendant may suffer multiple convictions for different offenses arising from the same act or course of conduct. (§ 954; *People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227 (*Reed*).) However, a judicially created exception to this rule "prohibits multiple convictions based on necessarily included offenses." (*People v. Montoya* (2004) 33 Cal.4th 1031, 1034 (*Montoya*).) An offense is necessarily included in a greater offense (i.e., is a lesser included offense) if the greater offense cannot be committed without also necessarily committing the lesser offense. (*Reed*, at p. 1227.)

In general, whether an offense is necessarily included within another offense is determined by one of two tests: the elements test (whether the statutory elements of the greater offense include all the statutory elements of the lesser offense) or the accusatory

pleading test (whether the facts alleged in the accusatory pleading include all the elements of the lesser offense). (*Reed, supra,* 38 Cal.4th at pp. 1227-1228.) But in the context of deciding whether a defendant may be convicted of different offenses arising from the same act or course of conduct, the accusatory pleading test does not apply: We examine only the elements of the different offenses to see whether one is necessarily included within the other. (*Id.* at pp. 1229-1230.) Therefore, we are concerned only with whether the statutory elements of simple battery include all the statutory elements of assault by means of force likely to cause great bodily injury. As we shall explain, they do not.

An assault is an unlawful attempt to commit a battery (that is, "any willful and unlawful use of force or violence upon the person of another") coupled with the present ability to do so. (§§ 240, 242; *People v. Elam* (2001) 91 Cal.App.4th 298, 308.) Assault by means of force likely to produce great bodily injury is an assault executed with force capable of causing "significant or substantial injury." (*People v. Brown* (2012) 210 Cal.App.4th 1, 7.) However, to commit this offense, it is not necessary to make physical contact with the victim. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.)

Battery, unlike assault by means of force likely to cause great bodily injury, requires an actual touching of the victim. (*People v. Marshall* (1997) 15 Cal.4th 1, 38-39.) Because the statutory elements of assault by means of force likely to cause great bodily injury do not include the statutory element of touching the victim, battery is not a necessarily included offense of that form of assault and that form of assault is not a necessarily included offense of battery. (Cf. *Reed, supra,* 38 Cal.4th at pp. 1229-1230.) The ban on "multiple convictions based on necessarily included offenses" (*Montoya, supra,* 33 Cal.4th at p. 1034) therefore does not apply to these two offenses.

Defendant relies on *People v. Ortega* (1998) 19 Cal.4th 686, which states: "A defendant who commits a battery may not be convicted of both battery and assault, because '[a]n assault is a necessary element of battery, and it is impossible to commit

battery without assaulting the victim.' (*People v. Greer* (1947) 30 Cal.2d 589, 597, not followed on other grounds in *People v. Pearson* [(1986)] 42 Cal.3d 351, 358, and overruled on other grounds by *People v. Fields* (1996) 13 Cal.4th 289, 308, fn. 6.)" (*Ortega*, at pp. 692-693.) *Ortega* does not assist defendant. First, the quoted passage is dictum: the issue in the case was whether, in light of the rule against multiple convictions for necessarily included offenses, the defendants could properly be convicted of both carjacking and grand theft (*id.* at p. 693), and the discussion of assault and battery merely illustrated the general principle of law involved. Second, neither *Ortega*, nor *Greer*, the venerable case on which *Ortega* relies, considers the forms of aggravated assault defined in section 245. Thus, neither decision supports defendant's argument. And, as we have shown, the elements test which we must apply (*Reed*, *supra*, 38 Cal.4th at pp. 1229-1230) proves that aggravated assault is not a necessarily included offense of simple battery.

Defendant was properly convicted of battery as a lesser included offense on count two in addition to assault by means of force likely to cause great bodily injury on count one.

2.0 Abstract of Judgment

The Attorney General points to an error in the abstract of judgment: Although the trial court sentenced defendant to four years, line nine of the abstract states that the "total time imposed" is two years. We direct the trial court to order the preparation of an amended abstract of judgment that gives the correct four-year term on line nine.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment as described in part 2.0 of the Discussion and to forward a certified copy thereof to the Department of Corrections and Rehabilitation.

BUTZ, Acting P. J.

We concur:

MAURO, J.

DUARTE, J.